

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :18.01.2019

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.48765 of 2006

M/s Triveni Alloys Ltd.
Rep.by its Director,
Sampath Raj,
A-14 and B-17, SIPCOT,
Industrial Complex,
Gummidipoondi.

... Petitioner

vs

The Assistant Commissioner of Central Excise,
Chennai V Division,
Chennai II Commissionerate,
M.H.V.Complex, Nandanam,
692, Anna Salai,
Chennai-600 035

... Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records relating to the order passed by the respondent in order in Original No.31/2005 dated 21.11.2005 and quash the same as arbitrary, contrary to the CENVAT scheme and unsustainable.

For Petitioner : Mr.K.Jayachandran

For Respondents : Mr.A.P.Srinivas
Senior Counsel(Central Excise)

ORDER

The order passed by the Assistant Commissioner of Central Excise in proceeding dated 21.11.2005 is under challenge in the present writ petition.

2. The petitioner is engaged in the manufacture of steel ingots and excisable commodities. The petitioner possesses valid central excise registration certificate. The raw material in the manufacture of steel ingots is melting scrap. This raw material

is either procured locally or imported from foreign countries. The petitioner purchased the melting scrap from M/s.Vriksh Trans World Holding Ltd., Chennai and M/s.Haripriya Steels Pvt. Ltd. who imported them from foreign countries. The said importer has paid the custom duty and CVD by DEPB credits. There is no dispute on these facts.

3. The learned counsel for the petitioner states that the imported material were used for the manufacture of final product. At the time of clearance of finished product, the petitioner availed CENVAT credit of the duty element paid by DEPB credit. The dispute relates to the period of covering the imports from 08.09.2004 to 04.02.2005, during which period, the petitioner purchased the imported goods for which custom duty and CVD were paid by the DEPB credits.

4. The respondent issued show cause notice proposing to recover an amount of Rs.4,84,224.00/- on the allegation of wrong availment of CENVAT credit and also proposed to impose penalty and interest. The petitioner had submitted his objections/explanations stating that the petitioner is not liable to pay the penalty and interest as their transactions were well in accordance with the instructions/circulations and as per the rules in force. With these backgrounds, the present writ petition is filed.

5. The learned counsel for the writ petitioner states that the respondent has passed the impugned order despite the fact that all these legal grounds were raised by the writ petitioner before the Original Authority. The Original Authority had failed to consider the legal grounds raised by the petitioner in this regard and the factual aspects placed before the Authorities. Thus, the petitioner is constrained to move the present writ petition.

6. This Court is of an opinion that admittedly, the order impugned is an appealable order under Section 35 of the Central Excise Act, 1944 which states as follows:

SECTION 35- Appeals to Commissioner (Appeals).- Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer, lower in rank than a Commissioner of Central Excise, may appeal to the Commissioner of Central Excise (Appeals) hereafter in this Chapter referred to as the Commissioner (Appeals) within sixty(60) days from the date of the communication to him of such decision or order.

:Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.(1A) The Commissioner (Appeals) may, if sufficient cause is shown at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing :Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal. Every appeal under this section shall be in the(2) prescribed form and shall be verified in the prescribed manner".

7. This Court is of an opinion that statutory appeals are to be exhausted by the aggrieved persons and the writ proceedings can be entertained only on certain exceptional circumstances, where there is a gross injustice which cannot be cured or filing of an appeal will cause greater damage to the aggrieved person. In all other circumstances, the person aggrieved must approach the Appellate Authority by setting out the factual as well as the legal grounds for effective adjudication of the issues.

8. Specific restraints are to be maintained by the constitutional Courts also, as Appellate institutions are created under the Statute in order to adjudicate the facts on merits and the legal grounds by verifying the original documents and by adducing the evidences if required. If such powers are reserved at the first instance by the Writ Court, this Court is afraid that the very purpose and object of providing such statutory appeal to redress the remedies will be divided.

9. The Parliamentarians while enacting the appeal, previously thought fit that the orders of the Original Authority to be checked and re-checked by the Higher Authorities to confirm the correctness or otherwise in respect of the decision taken and the findings recorded. Under those circumstances, the Constitutional Courts also should exercise to restrain in entertaining writ proceedings against the order originally passed by the Original Authorities. When the appeal provisions or appeal are available indeed statutory, in the event of adjudicating all these original facts and details in merits in a writ proceedings, the same will cause prejudice to the interest of the parties and the High Court must be in a position to appreciate the original facts and details referred by the Original Authority in a writ proceedings. Such exercise requires

verification of original documents and that cannot be done in a writ proceeding in all the writ petitions. Only on certain exceptional circumstances, High Court adjudicate the original issues in order to provide substantial justice to the litigants. In all other cases, the persons aggrieved must be directed to approach the appellate authorities at first instance and thereafter they can file writ petitions or approach the competent forum for the purpose of redressing their grievances.

10. This being the legal principles to be followed, this court is of an opinion that entertaining of writ proceedings against the original order is certainly not preferable. Preferring an appeal is a rule, entertaining a writ petition is an exception. Thus, the writ petitioner, in the present case has not established any point in exception and therefore, the petitioner has to approach the appellate authority, namely the Commissioner of Central Excise for redressing his grievances in the manner known to law. The said legal principles in the matter of exhausting the appeal remedies are decided by this Court in the case of M/s.Hyundai Motor India Limited Vs. The Deputy Commissioner of Income Tax in W.P.No.22508 of 2017 decided on 16.07.2018. The relevant paragraphs are extracted hereunder:

19.Unnecessary or routine invasion into the statutory powers of the competent authorities under a statute should be restrained by the Constitutional Courts. Frequent or unnecessary invasions in the executive power will defeat the constitutional perspectives enshrined under the Constitution of India. Undoubtedly, the separation of powers under the Indian Constitution has been narrated and settled in umpteen number of judgments. Separation of powers demarcated in the Constitution of India is also to be considered, while exercising the powers of judicial review in the matter of dispensing with the appeal remedy provided for an aggrieved person under a statute. If the High Courts started interfering with such Appellate powers without any valid and substantiated reasons, then the very purpose and object of the statute and provision of appeal under the statute became an empty formality and the High Courts also should see that the provisions of appeal contemplated under the statutes are implemented in its real spirit and in accordance with the procedures contemplated under the rules constituted thereon. While entertaining a writ petition as narrated by the Apex Court, the provision of efficacious alternative remedy under the statute also to be considered. If the writ petitions are entertained in a routine manner, by

not allowing the competent Appellate authority to exercise their powers under the provisions of the statute, then this Court is of an opinion that the power of judicial review has not exercised in a proper manner. Thus, it is necessary for this Court to elaborate the legal principle settled in respect of the separation of powers under the Constitution of India.

1. Madras Bar Association vs. Union of India (UOI) (25.09.2014 - SC) : MANU/SC/0875/2014

If the historical background, the preamble, the entire scheme of the Constitution, relevant provisions thereof including Article 368 are kept in mind there can be no difficulty in discerning that the following can be regarded as the basic elements of the constitutional structure. (These cannot be catalogued but can only be illustrated):

- (1) The supremacy of the Constitution.
- (2) Republican and Democratic form of government and sovereignty of the country.
- (3) Secular and federal character of the Constitution.
- (4) Demarcation of power between the Legislature, the executive and the judiciary.
- (5) The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.
- (6) The unity and the integrity of the Nation.

2. Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr. [MANU/SC/0445/1973]: (1973) 4 SCC 225].

That separation of powers between the legislature, the executive and the judiciary is the basic structure of the Constitution is expressly stated by Sikri, C.J.

3. P. Kannadasan and Ors. v. State of T.N. and Ors. [MANU/SC/0650/1996 : (1996) 5 SCC 670] the Supreme Court noted that the Constitution of India recognised the doctrine of separation of powers between the three

organs of the State, namely, the legislature, the executive and the judiciary. The Court said:

It must be remembered that our Constitution recognises and incorporates the doctrine of separation of powers between the three organs of the State, viz., the Legislature, the Executive and the Judiciary. Even though the Constitution has adopted the parliamentary form of government where the dividing line between the legislature and the executive becomes thin, the theory of separation of powers is still valid.

4. State of Tamil Nadu and Ors. vs. State of Kerala and Ors. (07.05.2014 - SC) : MANU/SC/0425/2014

121. On deep reflection of the above discussion, in our opinion, the constitutional principles in the context of Indian Constitution relating to separation of powers between legislature, executive and judiciary may, in brief, be summarized thus:

(i) Even without express provision of the separation of powers, the doctrine of separation of powers is an entrenched principle in the Constitution of India.

The doctrine of separation of powers informs the Indian constitutional structure and it is an essential constituent of rule of law.

In other words, the doctrine of separation of power though not expressly engrafted in the Constitution, its sweep, operation and visibility are apparent from the scheme of Indian Constitution. Constitution has made demarcation, without drawing formal lines between the three organs- legislature, executive and judiciary. In that sense, even in the absence of express provision for separation of power, the separation of power between legislature, executive and judiciary is not different from the constitutions of the countries which contain express provision for separation of powers.

(ii) Independence of courts from the executive and legislature is fundamental to the rule of law and one of the basic tenets of Indian Constitution.

Separation of judicial power is a significant constitutional principle under the Constitution of India.

(iii) Separation of powers between three organs-- legislature, executive and judiciary--is also nothing but a consequence of principles of equality enshrined

in Article 14 of the Constitution of India. Accordingly, breach of separation of judicial power may amount to negation of equality Under Article 14. Stated thus, a legislation can be invalidated on the basis of breach of the separation of powers since such breach is negation of equality Under Article 14 of the Constitution.

(iv) The superior judiciary (High Courts and Supreme Court) is empowered by the Constitution to declare a law made by the legislature (Parliament and State legislatures) void if it is found to have transgressed the constitutional limitations or if it infringed the rights enshrined in Part III of the Constitution.

(v) The doctrine of separation of powers applies to the final judgments of the courts. Legislature cannot declare any decision of a court of law to be void or of no effect. It can, however, pass an amending Act to remedy the defects pointed out by a court of law or on coming to know of it aligned.

In other words, a court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.

(vi) If the legislature has the power over the subject-matter and competence to make a validating law, it can at any time make such a validating law and make it retrospective. The validity of a validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation law it removes the defect which the courts had found in the existing law."

20. This Court is of a strong opinion that institutional respects are to be maintained by the constitutional Courts. Whenever there is a provision for an appeal under the statute, without exhausting the remedies available under the statute, no writ petition can be entertained in a routine manner. Only on exceptional circumstances, the remedy of appeal can be waived, if there is a gross injustice or if there is a violation of fundamental rights ensured under the Constitution of India. Otherwise, all the aggrieved persons from and out of the order passed by the original authority is bound to approach the Appellate Authority. The Constitutional Courts cannot make an appeal provision as an empty formality. Every Appellate Authority created under the statute to be

trusted in normal circumstances unless there is a specific allegation, which is substantiated in a writ proceedings. Thus, the institutional functions and exhausting the appeal remedies by the aggrieved persons, are to be enforced in all circumstances and writ proceedings can be entertained only on exceptional circumstances. Rule is to prefer an appeal and entertaining a writ is only an exception. This being the legal principles to be followed, this Court cannot entertain the writ petitions in a routine manner by waiving the remedy of appeal provided under the statute.

21. Now, let us look into the legal principles settled by the Apex Court for exhausting the efficacious alternative remedy provided under the statute.

22. When an effective alternative remedy is available, a writ petition cannot be maintained. 1. In *City and Industrial Development Corporation v. Dossu Aardeshir Bhiwandiwalla and Ors.* MANU/SC/8250/2008 : (2009) 1 SCC 168, this Court had observed that:

The Court while exercising its jurisdiction under Article 226 is duty-bound to consider whether:

- (a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;
- (b) the petition reveals all material facts;
- (c) the Petitioner has any alternative or effective remedy for the resolution of the dispute;
- (d) person invoking the jurisdiction is guilty of unexplained delay and laches;
- (e) ex facie barred by any laws of limitation;
- (f) grant of relief is against public policy or barred by any valid law; and host of other factors.

2. *Kanaiyalal Lalchand Sachdev and Ors. vs. State of Maharashtra and Ors.* (07.02.2011 - SC) : MANU/SC/0103/2011

It is well settled that ordinarily relief Under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See *Sadhana Lodh v. National Insurance Co. Ltd.*; *Surya Dev Rai v. Ram*

Chander Rai and SBI v. Allied Chemical Laboratories.)

3. Commissioner of Income Tax and Ors. v. Chhabildass Agarwal, MANU/SC/0802/2013 : 2014 (1) SCC 603, as follows:

Para 15. while it can be said that this Court has recognised some exceptions to the Rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case, Titaghur Paper Mills case and other similar judgments that the High Court will not entertain a petition Under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

4. Authorized Officer, State Bank of Travancore and Ors. vs. Mathew K.C. (30.01.2018 - SC) : MANU/SC/0054/2018

The petitioner argued that the SARFAESI Act is a complete code by itself, providing for expeditious recovery of dues arising out of loans granted by financial institutions, the remedy of appeal by the aggrieved under Section 17 before the Debt Recovery Tribunal, followed by a right to appeal before the Appellate Tribunal under Section 18. The High Court ought not to have entertained the writ petition in view of the adequate alternate statutory remedies available to the Respondent. The interim order was passed on the very first date, without an opportunity to the Appellant to file a reply. Reliance was placed on United Bank of India vs. Satyawati Tandon and others, 2010 (8) SCC 110, and General Manager, Sri Siddeshwara Cooperative Bank Limited and another vs. Iqbal and others, 2013 (10) SCC 83. The writ petition ought to have been dismissed at the threshold on the ground of maintainability. The Division Bench erred in

declining to interfere with the same. The Supreme Court agreed to the arguments and held the same also noted that the writ petition ought not to have been entertained and the interim order granted for the mere asking without assigning special reasons, and that too without even granting opportunity to the Appellant to contest the maintainability of the writ petition and failure to notice the subsequent developments in the interregnum.

5. State of Himachal Pradesh v. Gujarat Ambuja Cement Ltd. reported at AIR 2005 SC 3856, the Supreme Court explained the rule of 'alternate remedy' in the following terms Considering the plea regarding alternative remedy as raised by the appellant-State. Except for a period when Article 226 was amended by the Constitution (42nd Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction of discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction.

6. K.S. Rashid and Sons v. Income Tax Investigation Commission and Ors., AIR (1954) SC 207; Sangram Singh v. Election Tribunal, Kotah and Ors., AIR (1955) SC 425; Union of India v. T.R. Varma, AIR (1957) SC 882; State of U.P. and Ors. v. Mohammad Nooh, AIR (1958) SC 86 and M/s K.S. Venkataraman and Co. (P) Ltd. v. State of Madras, AIR (1966) SC 1089,

Constitution Benches of the Supreme Court held that Article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is

satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted.

7. First Income-Tax Officer, Salem v. M/s. Short Brothers (P) Ltd., [1966] 3 SCR 84 and State of U.P. and Ors. v. M/s. Indian Hume Pipe Co. Ltd., [1977] 2 SCC 724.

There are two well recognized exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings itself are an abuse of process of law the High Court in an appropriate case can entertain a writ petition.

23. Considering the above judgments of the Apex Court, this Court is of an opinion that the writ petitioner has not established that there is a violation of principles of natural justice nor there is an error apparent on record. No exceptional circumstances have been established in the present writ petition. If at all, the writ petitioner is aggrieved in respect of the fixing of average rate of royalty payment, then it is left open to them to approach the Disputes Resolution Panel and thereafter, if they are further aggrieved in respect of the fixing of average rate of royalty payment, then they are at liberty to approach "the ITAT" constituted for the purpose of adjudicating the issues. This being the efficacious remedy available under the statute for the writ petitioner, there is no reason to entertain a writ petition under Article 226 of the Constitution of India, so as to adjudicate the merits and the demerits now raised before this Court in the present writ petition in respect of fixing of average rate of royalty payment.

11. In view of the legal principles narrated(supra), this Court is of an opinion that the writ petitioner has to approach the Appellate Authority. Accordingly, the petitioner is at liberty to approach the Appellate Authority namely, The Commissioner of Central Excise under Section 35 of the Central Excise, 1944 within a period of 6 weeks from the date of the receipt of a copy of this order. In the event of preferring any such appeal, the Commissioner is directed to entertain the appeal, adjudicate the issues on merits and in accordance with law by affording an opportunity to the writ petitioner and take a decision and pass orders within a reasonable period of time. Accordingly, the writ petition stands disposed of. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

ska/mrn

To

The Assistant Commissioner of Central Excise,
Chennai V Division
Chennai II Commissionerate,
M.H.V.Complex, Nandanam,
692, Anna Salai, Chennai-600 035

+1 cc to Mr.A.P.Srinivas, Advocate SR.No.3787

+1 cc to Mr.K.Jayachandran, Advocate SR.nNo.3927

W.P.No.48765 of 2006

RV(CO)
CSL/21.03.2019

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